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No. 173

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

HOWE A. STIDGER, *ET UX.*,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW

JOHN A. REED
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the Judgment Below

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW

Preliminary Statement

On November 7, 1966, this Court entered an order inviting John A. Reed "to brief and argue this case, as *amicus curiae,* in support of the judgment below."

No exception is taken to the presentation in the Brief for the Petitioner (at pp. 1-2 thereof) of the material required by Items (a) and (b) of Rule 40 of the Rules of this Court.

Question Presented

This case involves the question whether a Captain in the United States Marines who was on a regular tour of duty of 15 months in the Far East, and whose family was prohibited from accompanying him, may deduct from his gross income amounts expended for meals in 1958 at officers' messes in the Far East.

Statutes Involved

Internal Revenue Code of 1954 (26 U. S. C.):

"SEC. 62. ADJUSTED GROSS INCOME DEFINED.

For purposes of this subtitle, the term 'adjusted gross income' means, in the case of an individual, gross income minus the following deductions:

(1) *Trade and Business Deductions.*— . . .

(2) *Trade and business deductions of employees.* — . . .

(D) *Outside Salesmen.*—The deductions allowed by part VI (sec. 161 and following) which are attributable to a trade or business carried on by the taxpayer, if such trade or business consists of the performance of services by the taxpayer as an employee and if such trade or business is to solicit, away from the employer's place of business, business for the employer."

"SEC. 162. TRADE OR BUSINESS EXPENSES.

(a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business;"

* * * * * *

"For purposes of the preceding sentence, the place of residence of a Member of Congress (including any Delegate and Resident Commissioner) within the State, congressional district, Territory, or possession which he represents in Congress shall be considered his home, but amounts expended by such Members within each taxable year for living expenses shall not be deductible for income tax purposes in excess of $3,000."

* * * * * *

"SEC. 212. EXPENSES FOR PRODUCTION OF INCOME.

In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year—

(1) for the production or collection of income;"

* * * * * *

"SEC. 262. PERSONAL, LIVING, AND FAMILY EXPENSES.

Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses."

Statement of the Case

1. The Facts

Respondent* was during 1957 and 1958 a Captain in the United States Marine Corps. For approximately two and one-half years preceding October, 1957, he had been attached to a Marine Air Squadron stationed at El Toro, California. During this period he lived with his family

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*Mrs. Stidger is a party solely because a joint return was filed for 1958.

(his wife and two children) in nearby Santa Ana, California (R. 51).

On October 1, 1957, respondent, together with his squadron, commenced a standard tour of duty in the Far East with the First Marine Aircraft Wing, a part of Aircraft Fleet Marine Force, Pacific, with administrative headquarters at Marine Corps Air Station, El Toro, California (R. 15, 37, 51). On that date, he departed from El Toro, California, for Iwakuni, Japan (R. 51). Dependents of Marine Air personnel were prohibited by Marine Corps orders from accompanying such personnel or establishing homes in the Far East (R. 15-16, 26, 51). Such a prohibition was rare at that time in the Marines and in the other branches of the armed services (R. 38, 39). During respondent's tour of duty abroad, his wife and two children (aged one and eights years in October, 1957) continued to reside in Santa Ana, California (R. 39, 51).

Respondent's standard tour of duty was originally expected to last for 14 months, but in 1958 the standard tour of duty, for a commissioned officer in his circumstances, was changed to 15 months by a revised Directive relating to regular overseas tours of duty issued by the U. S. Marine Corps (R. 24-31, 48).

Respondent's itinerary from October, 1957 to December, 1958 was as follows (R. 51, 52):

Date	Place	Approximate No. of Days
1 Oct 57 to 20 Feb 58	Departed MCAS El Toro, Calif., traveled to, and duty at Iwakuni, Japan	142
21 Feb 58 to 7 Mar 58	Cubi Point, Philippine Islands	14
8 Mar 58 to 19 Apr 58	Iwakuni, Japan	42
20 Apr 58 to 23 May 58	Naha AFB, Okinawa	33

Date	Place	Approximate No. of Days
24 May 58 to 10 Aug 58	Iwakuni, Japan	78
11 Aug 58 to 29 Aug 58	Yokosuka, Japan	18
30 Aug 58 to 1 Sep 58	Iwakuni, Japan	2
2 Sep 58 to 19 Sep 58	San Diego, Calif.	17
20 Sep 58 to 25 Sep 58	Iwakuni, Japan	5
26 Sep 58 to 10 Oct 58	Naha AFB, Okinawa	14
11 Oct 58 to 14 Dec 58	Iwakuni, Japan	64
15 Dec 58 to 19 Dec 58	Travel to MCAS El Toro, Calif.	4

During 1958 respondent received the same pay he had been receiving in California (R. 37).

Throughout the entire year 1958 respondent received his basic housing allowance (approximately $102.50 per month) and his basic subsistence allowance (approximately $42.50 per month), representing the same amounts he had been receiving in California in 1957 while residing with his family in the United States (R. 16, 36, 37, 41, 51, 52).

While he was at Iwakuni, respondent was furnished free quarters but was required to pay for his own meals which were available at the post's officers' mess for approximately $65 per month (R. 4, 52). Respondent testified that these represented "additional expenses I would not normally have" (R. 37).

During the calendar year 1958 respondent was placed in travel status for 49 days, and he was reimbursed for the cost of his meals on those days by means of a *per diem* allowance; he does not claim any deduction for meals on those days (R. 16, 37, 42).

Respondent is claiming a deduction of $650 from gross income for 1958, representing the cost of meals at messes for 10 months at $65 per month. He paid for his meals during the other 2 months at officers' messes at several other places in the Far East (R. 42, 50, 51, 52).

Assuming that his initial trip from California to Iwakuni took 4 days (as did his final return trip), he was at Iwakuni during 1957-1958 approximately 329 days, but not for any single period of more than 138 days (R. 51, 52).

In December, 1958, respondent completed his tour of duty in the Far East and was assigned to duty at the Marine Corps Air Station, Cherry Point, North Carolina, where he remained until he retired in July, 1962 (R. 62, 53).

On his 1958 income tax return respondent deducted the $650 he had spent for meals in the Far East, computed on the basis of $65 per month for 10 months. The Commissioner disallowed the deduction.

2. The Proceedings Below

The Tax Court found that respondent's stay at Iwakuni was "not temporary" and that during 1958 his "home" within the meaning of §162(a)(2) of the Internal Revenue Code of 1954 was his military post of duty in the Far East. Accordingly, the Tax Court decided that the expenses in question were not incurred while "traveling • • • away from home," characterising his stay there as "indefinite, indeterminate, or permanent" (R. 50-57).

The United States Court of Appeals for the Ninth Circuit, one judge dissenting, reversed the Tax Court and held that the deduction claimed was allowable. The Court below rested its decision on the grounds that "home," as used in the statute, means residence, with the qualification that a taxpayer should establish his residence as near to his place of employment as is reasonable; that Captain Stidger during the taxable year 1958 was therefore away from "home"; and that the expenses claimed as a deduction by him were "ordinary and necessary." In conjunction with the foregoing analysis, the Court below commented that the words of the statute limiting deductions to "ordinary

and necessary'' expenses should prevent undesirable results in other cases from the application of its test.

The Court below concluded that, inasmuch as the statute allows the deduction of the *entire* amount expended for meals and lodging, it was unnecessary for the taxpayer to show that he would not have been obliged to pay an equal amount for meals at his home post in the United States.

Summary of Argument

This case involves the question whether a Captain in the United States Marines who was on a regular tour of duty of 15 months in the Far East, and whose family was prohibited from accompanying him, may deduct from his gross income amounts expended for meals in 1958 at officers' messes in the Far East. The Court below correctly held that respondent was entitled to deduct such amounts.

''Home'', as used in the statute, means residence, with the qualification that a taxpayer should establish his residence as near to his place of employment as is reasonable. Thus, if it appears reasonable to have expected a taxpayer to move his family and permanent abode to his new station or closer to his new station, and thus avoid the double burden (maintaining his home abode and meeting the living expenses of his place of employment) that the statute intended to mitigate, then expenses claimed as travel expenses cannot be deducted.

The words of the statute limiting deductions to ''ordinary and necessary'' expenses should prevent undesirable results.

The affirmance by this Court of the decision of the Court below, even if rested on the same grounds relied on below, need not drastically affect the position of the Internal Revenue Service in this field nor change the result in any great number of cases.

Thus the Service's position seems to be that "home" as used in the statute, means, at least as a general rule, the taxpayer's principal place of employment, to which general rule the Service admits there are several exceptions.

In the alternative, even if the Service's general rule as to the meaning of "home" is to govern, it is submitted that the deduction here claimed should be allowed by this Court, either by carving out another exception to the Service's general rule, or by extending its "temporary" exception, its "construction worker" exception, or its "traveling salesman" exception to cover at least Captain Stidger's factual situation (where it was absolutely impossible for him to move his family to the locality in which he was working) and perhaps to cover other factual situations where (1) the taxpayer has a family living elsewhere (than where he works) and (2) at the time the taxpayer's employment at a new post of duty is begun, it is unreasonable (on the basis of an objective, not a subjective, standard) to expect him to move his family there.

There is nothing to indicate that Congress intended, or has approved, an interpretation of the statute such as to require the disallowance of a deduction of the type claimed in the case at bar. The legislative history of the statute is inconclusive as to whether Congress intended, or has accepted, the Internal Revenue Service's interpretation of "home." Nor have the Federal income tax regulations ever contained any provision defining "home" or throwing any light on the position of the Service with respect to a case such as this.

The Internal Revenue Service rulings, while not entirely consistent over the years, have taken the position for many years that "home" ordinarily refers to the taxpayer's principal place of business. Nevertheless, the

Service has often changed its position with respect to the application of the statute to various factual situations.

Even the Tax Court has concluded that the Service's "overnight" rule in this field makes no sense. But the "overnight" rule is not the only one of the Service's rules in this field which makes no sense.

The Service's rules with respect to servicemen, summarized in Appendix B hereto, at the very least result in inequalities. For example, a naval officer is permitted to deduct the entire cost of his meals on board ship when it is away from home port (whether he is single or has a family and whether or not he maintains a place of abode elsewhere). Thus the supposed reason for the deduction, the duplication in expense, is being ignored.

On the other hand, a serviceman is permitted to deduct no part of the cost of his meals (a) at his home port or base or (b) when stationed at one locality (in this country or overseas) for an indefinite period.

To be contrasted is the treatment of the traveling salesman who has no fixed place of business. He is apparently treated as being away from "home" only if he has a place of abode to which he can return at any time. Not only is this a recognition by the Service that "home" sometimes means a place of abode but it is also inconsistent with permitting a naval officer to deduct the cost of his meals on board ship whether or not he has a place of abode to which he can return at any time.

The fact that respondent was an officer in the Armed Services should not affect the result. The allowance of the deduction here claimed would not distort the basic purpose of the statute or give respondent and similarly situated servicemen advantages not available to other taxpayers.

Respondent received the same pay and basic allowances while in the Far East as he did while residing with his family in the United States. These basic allowances (for subsistence and quarters), which he continued to receive, are granted by law independently of whether the officer is required to travel and are entirely unrelated to expenses incurred in travel. No increase therein was received by him during the taxable year 1958 to help defray the increased expenses incurred by him while required to live away from his family.

Respondent was therefore worse off economically in the taxable year 1958 than he had been before he went to the Far East.

This was so, in spite of the fact that his basic allowance for subsistence continued to be tax-free.

Captain Stidger's expenses for meals in the Far East, at least to the extent that they represented increased expenses which he would not have had when living with his family, constituted ordinary and necessary expenses which should be deductible. They should be deductible, moreover, regardless of the period of his stay in the Far East. So long as it was impossible for him to take his family along, at the very least, these additional expenses for meals were ordinary and necessary expenses, regardless of the duration of his stay.

The allowance of the deduction here claimed should tend to improve the morale of servicemen and others similarly situated.

I

"Home" means residence but must be established as near the place of employment as is reasonable.

As the Court below held, "home," as used in the statute, means residence, with the qualification that a taxpayer should establish his residence as near to his place of employment as is reasonable; thus, if it appears reasonable to have expected a taxpayer to move closer to his place of employment, then some or all of the expenses claimed as travel expenses should not be deductible. The words of the statute limiting deductions to "ordinary and necessary" expenses should prevent undesirable results.

(a) This Court Has Not Defined "Home".

This Court has not defined "home" as used in this statute.

In *Commissioner* v. *Flowers*, 326 U. S. 465 (1946), a lawyer who had long lived and practiced law in Jackson, Mississippi, was employed as the principal counsel of a railroad with its main office in Mobile, Alabama, on the understanding that he could continue to reside in Jackson but would pay his own traveling expenses between Jackson and Mobile and his living expenses at both places. The railroad for many years permitted the taxpayer to do his work at either Jackson or Mobile but provided him with an office only at Mobile, which the Court regarded as his principal post of business. Although it was clearly the result of his own choice that he did not perform nearly all of his work in Mobile, the taxpayer sought to deduct the cost of transportation for 73 trips from Jackson to Mobile and for meals and lodging while in Mobile during the years

in suit. Affirming the Tax Court's decision, the Supreme Court held for the Commissioner on the ground that the expenses in issue were not incurred "in pursuit of business" because the travel was required not by the railroad's business but solely by reason of the taxpayer's personal desire to maintain his residence in Jackson while his principal post of duty was in Mobile. As the Court observed, "Business trips are to be identified in relation to business demands and the traveler's business headquarters. The exigencies of business rather than the personal conveniences and necessities of the traveler must be the motivating factors." 326 U. S. 465, at 474. The majority opinion said that it was not passing upon the meaning of "home". The dissenting opinion (by Justice Rutledge) expressed the view (at p. 477) that "home" should be given its normal meaning.

In *Peurifoy* v. *Commissioner*, 358 U. S. 59 (1958), this Court considered the deductibility of expenses of construction workers for board and lodging while at a construction project in North Carolina. This Court did not reach any substantive question on the merits, holding only that the Court of Appeals had fairly assessed the record on the sole question presented by the parties as to whether the employments there involved were "temporary" as contrasted with "indefinite" or "indeterminate."

The dissenting opinion in the *Peurifoy* case (by Justice Douglas, with whom Justices Black and Whittaker concurred) expressed the view (at p. 62) that "home" was not synonymous with the situs of the employer's business; that, if construction workers do not take their families with them, they are living "away from home" for the duration of the term of the jobs. The dissenting opinion would have rejected the Service's test of whether the employment was "temporary" or "indefinite," on the ground that it

improperly emphasized duration of the absence as the determinative factor in deciding where the taxpayer's home is.

(b) The Legislative History of the 1921 Act was Inconclusive as to the Meaning of "Home".

The discussion in Petitioner's Brief (pp. 8-9) of the legislative history of the Revenue Act of 1921* appears substantially accurate, insofar as it goes. It is interesting to note, in addition, that two Senators, both members of the Senate Finance Committee but neither the Chairman, presented conflicting views of "home" in the debate on the floor of the Senate with respect to that Revenue Bill.

Thus Senator David Walsh of Massachusetts stated it to be his personal view that this provision would allow Congressmen to deduct their meals and lodging expenses while in Washington.**

Senator James Watson of Indiana replied that he had been advised "by those who are here representing the Treasury Department" that no such deduction would be allowable to members of Congress because (1) being a member of Congress was not engaging in a trade or business and (2) Washington was a Congressman's "home."***

It is not clear whether the Treasury Department at that time rested its view that Washington was a Congressman's "home" on the ground that (a) it was the place where he carried on most of his duties as a Congressman, or (b) it was the place where he and his family were living.

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* Section 214(a), Revenue Act of 1921.

** 61 Cong. Rec. 6673 (1921).

*** 61 Cong. Rec. 6673 (1921).

(c) The Position of the Internal Revenue Service as to the Meaning of "Home" has not been Entirely Consistent over the Years.

The Federal Income Tax Regulations have never contained any provision throwing any light on the position of the Service with respect to the meaning of "home."

Nor have the published rulings of the Service been entirely consistent, it is submitted, in stating that "home" ordinarily refers to the taxpayer's principal place of business. To be sure, as pointed out in the majority opinion of this Court in the *Flowers* case (at pp. 471-472), some rulings, of which some are cited in footnote 5 (326 U. S. 465, 472), have so held.

But some of the early rulings denied the deduction on grounds unrelated to the meaning of "home." It was held, for example, that a naval officer who was stationed in one locality "for an indefinite period of time" could not deduct under the Revenue Act of 1921 the cost of his meals and lodging because he was not "engaged in traveling in pursuit of a trade or business." I. T. 1404, I-2 Cum. Bull. 145 (1922). The ruling did not attempt to define "home."

In at least two early rulings, moreover, both promulgated in 1922, the Service said that the taxpayer was away from "home" while working if, and only if, he maintained a house or other living quarters to which he could always return. I. T. 1490 (single salesman who travels 365 days a year) and I. T. 1497 (naval officer on board ship).*

In 1941 the Service announced it was still following its 1922 ruling that a naval officer may deduct his expenses for meals on board ship if, and only if, he maintains a house or living quarters to which he can return at any time. I. T. 3474, 1941-1 Cum. Bull. 207.

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*Both reported at I-2 Cum. Bull. 89 (1922).

In 1955, the Service modified these 1922 and 1941 rulings with respect to naval officers, however, as more fully set forth under Point III below, "to the extent that they are inconsistent with the foregoing conclusions concerning the meaning of the term 'home.'" Revenue Ruling 55-571, 1955-2 Cum. Bull. 44.

Revenue Ruling 55-571 announced the surprising rule that members of the Armed Forces of the United States "on permanent duty assignments at official stations overseas," are not traveling "away from home" and may not deduct their expenses for meals and lodging at such locations, even though they are required to maintain homes in the United States for their families *who are not allowed to accompany them.* Rev. Rul. 55-571, 1955-2 Cum. Bull. 44.

Revenue Ruling 55-571 justified that position solely on the ground that recent court decisions had indicated that "home" was located at the place which constituted a taxpayer's principal or regular post of duty even though it was difficult or impossible for a taxpayer to maintain his family abode at his principal or regular place of business, citing only *Warren* v. *Commissioner,* 13 T. C. 205 (1949) *Jones* v. *Commissioner,* 13 T. C. 880 (1949).

But the authority of those cases has been seriously undermined by subsequent developments. In those cases the denial of the deduction claimed was rested upon the failure of the taxpayer to meet a supposed requirement that the expenses be necessary to the prosecution of his employer's business, relying upon *dictum* in the majority opinion of this Court in *Commissioner* v. *Flowers, supra.* Under that supposed requirement it was held, in the *Warren* and *Jones* cases, to be "irrelevant" that it was difficult or impossible for the taxpayer to move his family to the place where he was working.

In 1960 the Service announced that a taxpayer-employee has his own business to prosecute and, therefore, need not be furthering the interests of his employer to be eligible for this deduction. Revenue Ruling 60-189, 1960-1 Cum. Bull. 60, 65. Indeed, no such argument had been made by the Government in the *Peurifoy* case, as was pointed out in footnote 6 (at 358 U. S. 59, 63) of the dissenting opinion therein.

Thus, while the Service has not specifically repudiated Revenue Ruling 55-571, that ruling now rests on a shaky foundation, to the extent it holds it to be immaterial that it is impossible for a taxpayer to maintain his family abode at his principal place of business.

Revenue Ruling 55-571 is unique in that it represents the Service's only announcement that the fact that it is impossible for a taxpayer to move his family to the place where he is working is irrelevant; it is limited to one class of taxpayers—members of the Armed Forces "on permanent duty assignments at official stations overseas." Inasmuch as the Service has carved out other exceptions to its general rule as to the interpretation of "home," it is surprising that it has not carved out an additional exception covering the "impossible-to-move case." Certainly in such a situation the expenses are "ordinary and necessary."

Perhaps the other ruling that comes closest to dealing with the "impossible-to-move" case is Revenue Ruling 60-189, 1960-1 Cum. Bull. 60, relating to construction workers.

In the case of one who usually works in and around the city where he maintains his regular place of abode but at times is employed at distant points for various periods of time, it was held that he could deduct the cost of his meals

and lodging at or near the project sites, at least so long as his distant employment is not expected to extend nor does in fact extend for as long as one year at any one location. There was no limitation restricting the duration of the combined periods of absence while at several project sites; they might well aggregate more than one year. His "home" was said to be the vicinity in which he usually worked; his employment at the other locations was pronounced "temporary" and he was, therefore, found to be away from "home" when at the various projects.

The ruling went on to state that the Service has never attempted to prescribe any specific length of time as representing the usual line of demarcation between temporary and non-temporary periods but that "an employment or stay of *anticipated* or *actual* duration of a year or more at a particular location must be viewed by the Service as strongly tending to indicate presence there beyond a temporary period, and cases involving such an employment or stay will normally for that reason alone be subjected to close scrutiny." (Emphasis theirs; 1960-1 Cum. Bull. 60, 63:)

In the absence of some indication of a tax avoidance abuse, however, the Service "will normally raise no question concerning the temporary nature of an employment or stay at a particular location if both its anticipated and actual durations are for less than one year."* (1960-1 Cum. Bull. 60, 64).

The same ruling, Revenue Ruling 60-189, dealt also with the case [Case (2)] of a construction worker who does not regularly work in the locality where (a) he maintains his regular place of abode and (b) his employment contacts

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* In view of the fact that Captain Stidger was not at any one location in the Far East for as much as twelve months, the ruling comes close to giving him its blessing.

are maintained. His expenses for meals, lodging, etc., at the various construction projects were held deductible on the theory that his "home" was in the locality where he maintained his regular place of abode and where he had his employment contacts. It was assumed that he would not work more than twelve months at any one project. In justifying this conclusion, the ruling said (p. 67):

> "It would be quite another matter, and would *wrench the meaning of the word 'home' beyond the permissible bounds of statutory construction,* to read it as totally devoid of any commonly understood meaning and as comprehending no more and no less than one's principal or regular place of business or employment." (Italics supplied.)

Does not the position taken in Petitioner's Brief, however, "wrench the meaning of the word 'home' beyond the permissible bounds of statutory construction?"

Revenue Ruling 60-189 distinguished the case [Case (3)] of the itinerant construction worker who takes his family (if any) and his personal belongings with him from one construction job to another and has no actual residence elsewhere. The Service will continue to regard such a person as having his "home" for traveling expense purposes only at each successive place where he works.

The ruling admits that distinguishing between Case (2) and Case (3) in concrete cases "will present varied, and often difficult, questions of fact that can be resolved only in the light of all the facts and circumstances of the particular case"; it suggests that important considerations in doing so (p. 67) "are whether a claimed place of abode is the taxpayer's regular place of abode in a real and substantial sense and whether the facts as a whole tend to show that the undertaking of jobs away from the point where

business contacts are normally maintained is primarily for business rather than for personal reasons."

Petitioner's Brief contends, however (at p. 16), that the interpretation of "home" adopted by the Court below "would inevitably require the difficult case-by-case approach that the Commissioner's rule was designed to avoid." The implication seems to be that it is better to reach the wrong result in a case such as this rather than to force the Commissioner to assume "a great administrative burden." (Petitioner's Brief, p. 16).

But is has been shown above* that the Commissioner has voluntarily assumed such a burden in the case of construction workers. No reason suggests itself why he should be less willing to assume such a burden in the case of officers in the Armed Services.

Since 1954 the Internal Revenue Code has expressly provided for the allowance to "outside salesmen" of a deduction from gross income, in arriving at "adjusted gross income" of the deductions allowed by Code Section 162, quoted above. Code Section 62. For that purpose an "outside salesman" is defined as one whose trade or business is to solicit, away from his employer's place of business, business for his employer.

The Report of the Senate Finance Committee contains (at p. 10) the following general comment with respect to this provision of the Revenue Bill of 1954 (in addition to what is contained in the Detailed Discussion of the Technical Provisions of the Bill):

> "As in the case of the transportation expenses described above, business expenses of an 'outside salesman' who is an employee presently may be deducted in arriving at adjusted gross income only if they are reimbursed or incurred while he is away from home overnight.

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* See discussion of Revenue Ruling 60-189.

> If these salesmen were independent contractors they would be permitted to take business expense deductions in computing adjusted gross income and still use the standard deduction. Moreover, the business expenses incurred by outside salesmen usually are substantial relative to their incomes.
>
> Both the House and your committee's versions of this bill treat outside salesmen in effect like self-employed persons with respect to these expenses, permitting their deduction of expenses in arriving at adjusted gross income even though the salesmen use the standard deduction. *These deductions include expenditures for meals*, split commissions paid on subcontracts, etc. An 'outside salesman' is defined as an employee engaged principally in the solicitation of business for his employer at places other than the employer's place of business." (Italics supplied.)

It would appear from the provision just quoted that an "outside salesman" was to continue to be allowed a deduction for meals when on the road, both in computing "taxable income" or "net income", and in computing "adjusted gross income," at least if he was away from "home" overnight, even though he had no principal place of business; that his residence was to be treated as his "home."

As indicated above, an early ruling held that a salesman who was always traveling could deduct his expenses only if he had a place of abode to which he could return at any time. I.T. 1490, I-2 Cum. Bull. 89 (1922).

In view of the recent cases,* however, dealing with the right of a traveling salesman who has no principal place of business to deduct his expenses for meals and lodging

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* See, for example, *James* v. *U. S.*, 308 F. 2d 204 (9th Cir. 1962); *Hicks* v. *Commissioner*, 47 T. C. No. 7 (1966); *Deneke* v. *Commissioner*, 42 T. C. 981 (1964); *Scotten* v. *Commissioner*, 1966 T. C. M. 206 (1966).

unless he has living quarters to which he can return, it seems a fair inference that this is still a requirement of the Service; that I.T. 1490 is still being followed.

While Captain Stidger's income tax return for 1958 itemized deductions and while, therefore, the amount of his "adjusted gross income for 1958" is not here in issue, the legislative history of Code Section 62 is of interest in view of the cross-reference in Code Section 62 to the deductions allowable under Code Section 162.

The present position of the Service, in summary, seems to be that "home" ordinarily refers to the taxpayer's principal place of business, to which general rule the Service apparently admits there are at least the following exceptions: (1) the taxpayer is away from "home" if engaged in "temporary" employment away from (a) his principal place of business, (b) the place where he usually works, or (c) the place where his regular place of abode is located and his employment contacts are maintained;* and (2) a traveling salesman, having no fixed place of business, may deduct his expenses for meals** and lodging, at least if he maintains a house or other living quarters to which he may return at any time.***

In 1963 the Treasury Department recommended to the Congress a revision of the statutory provision here pertinent "to clarify existing law" as to the meaning of "away from home." Legislative proposals with respect to the 1963 Tax Bill were submitted to the Congress on February 6, 1963 by the Secretary of the Treasury. A technical Memorandum submitted by the Secretary at that time recommended an extensive revision of Code Section 162(a)(2), quoted above. The recommendation is set forth in full in the Appendix hereto.

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* Revenue Ruling 61-95, 1961-1 Cum. Bull. 479.

** If away overnight, at least.

*** I.T. 1490, I-2 Cum. Bull. 89 (1922).

Under those Treasury Department recommendations, it would appear that in a case such as Captain Stidger's the question would have become one of whether his absence from his "duty area" (his principal residence) was "temporary" in nature. He would probably have been denied a deduction for his meals in the Far East, at least under the literal wording of the recommendations, on the ground that he had been assigned to a new place of work (the Far East) and that his absence from his "duty area" (the place where his principal residence is located, assuming that he had no principal post) was not "temporary" in nature because he in fact remained at his new place of work for more than one year.

The Congress has not seen fit to take any legislative action as the result of such Treasury Department recommendations.

(d) Congress Should Not Be Deemed to Have Approved by Implication the Internal Revenue Service Definition of "Home".

Petitioner's Brief suggests (at pp. 8-11) that the Commissioner has defined "home" so consistently for so many years that his interpretation should be deemed to possess implied legislative approval.

It has been shown above, however, that the Commissioner's definition of "home" has been much less consistent over the years than Petitioner's Brief indicates. The Commissioner has adhered to his general rule (as to "home"), to be sure, for many years. The question has been as to the exceptions.

The rule that Congress would be deemed to have approved by implication a long-standing Internal Revenue

Service interpretation of the income tax statute arose in the days of the Revenue Acts when Congress re-enacted every two years or so every provision of the income tax statute.* Even in that setting it does not seem to have been applied consistently.**

In the present day era of Internal Revenue Codes (the 1939 and 1954 Codes being the only ones to date), in lieu of the Revenue Acts, there is much less reason for the rule. While it is true that Section 162 has been revised once since 1954 (by Section 4(b) of the 1962 Act), Congress was then focusing on the expense account abuse. See, for example, Report of the House Ways and Means Committee, pp. 19-26 with respect to the Revenue Bill of 1962.

One of this Court's most recent income tax opinions indicated that this "legislative re-enactment rule" of statutory interpretation does not apply to a long-standing interpretation by ruling, as differentiated from regulation. In *Commissioner* v. *Tellier*, 383 U. S. 687 (1966), this Court referred to the argument that the expenses under consideration there should be disallowed as a deduction on public policy grounds, stating (at pp. 690-691):

> "That view finds considerable support in other administrative and judicial decisions. It finds no support, however, in any regulation or statute or in any decision of this Court * * *."

Similarly where an administrative construction had been adhered to in the face of consistent rejection by Courts of Appeals and where there had been an inconsistency in the administrative interpretation of the statute

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* *Helvering* v. *Reynolds*, 306 U. S. 110 (1939); *Koshland* v. *Helvering*, 298 U. S. 441 (1936); *Morrissey* v. *Commissioner*, 296 U. S. 344 (1935); *Poe* v. *Seaborn*, 282 U. S. 101 (1930).

** Compare, for example, *Helvering* v. *Reynolds* and *Koshland* v. *Helvering*, *supra*.

(facts not unlike those in the case at hand), the National Labor Relations Board sought to have this Court follow the same course as that for which the Petitioner's Brief is asking here. The Court held:

> "With all this uncertainty surrounding the eventual authoritative interpretation of the existing law, the failure of Congress to enact a new law simply will not support the inference which the Board asks us to make."*

It is interesting to note that even the Tax Court** has finally refused to follow the Commissioner's long-standing "overnight" rule with respect to the deduction for meals under Section 162(a)(2). In *Bagley* v. *Commissioner*, 46 T. C. 176 (1966), the Tax Court, in failing to follow its many former decisions to the contrary said:

> "We have asked ourselves: In every situation does a strict application of the 'overnight' rule really make sense? And, secondly, *has Congress clearly given its approval* to an inflexible rule disallowing expenses incurred for meals on non-overnight trips? On reflection we believe both of these questions must be answered in the negative." (Italics supplied.)

(c) The Legislative History of the 1952 Amendment Does Not Show that Congress at that Time Accepted the Commissioner's Definition of "Home".

Petitioner's Brief refers (at p. 11) to the 1952 Congressional debates, with respect to a proposed amendment

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* *National Labor Relations Board* v. *Television Broadcast Engineers Union*, 364 U. S. 573, 585 (1961).

** Among the other courts that have refused to follow the "overnight" rule and thus have rejected any contention that Congress should be deemed to have approved by implication that long-standing position of the Service, are *Correll* v. *U. S.*, F. 2d (6th Cir.), decided November 29, 1966, opinion reported at 66-2 U. S. T. C. ¶ 9778; *Chandler* v. *Commissioner*, 226 F. 2d 467 (1st Cir. 1955); *Williams* v. *Patterson*, 286 F. 2d 333 (5th Cir. 1961); *Hanson* v. *Commissioner*, 298 F. 2d 391 (8th Cir. 1962).

to the Legislative Branch Appropriations Act to permit a Congressman a deduction for his living expenses in Washington, as showing that Congress at that time "apparently accepted the Commissioner's long-standing interpretation" of "home". Let us look at the record.

The stage for these 1952 debates had been set by the following factors:

(1) In 1934 the functions of a public office had been included by statute in the definition of a trade or business.* This seemed to leave "home" as the only ground for denying Congressmen meals and lodging expense deductions in Washington.

(2) In *Lindsay* v. *Commissioner of Internal Revenue*, 34 B. T. A. 840 (1936), the Board of Tax Appeals had denied to a Congressman a deduction for his meals and lodging while in Washington on the ground that he was not "away from home", reasoning that "home" meant his principal place of business, which was in Washington.

(3) In 1943 the Treasury had issued G. C. M. 23672, 1943 Cum. Bull. 66, allowing a deduction to a businessman for meals and lodging while in Washington as a "dollar-a-year man" rendering services to the Federal Government in connection with the war effort under a contract providing for the payment of a specific amount upon a *per diem* basis—if, and only if, he had not severed his connection with his private employer and continued to render active service to such private employer. It apparently continued to be the position of the Internal Revenue Serv-

*Section 48(d), 1934 Revenue Act, which has since been retained in the income tax statute. The Internal Revenue Service has stated that this legislation was declaratory of existing law; that military and civilian officers and employees of the Government have generally been regarded as engaged in a "trade or business," I.T. 4012, 1950 Cum. Bull. 33.

ice, however, that a Congressman could not deduct the cost of his meals and lodging in Washington.

(4) Finally, Congress in 1951 had abolished the tax-free expense allowance for its members (which had been in existence for some time). Revenue Act of 1951, Section 619(d).

The final form of the amendment, as enacted (Act of July 9, 1952, c. 598, 66 Stat. 464, Public Law 471, 82nd Cong., 2nd Sess.) provides that the place of residence of a member of Congress shall be considered to be his "home"* for purposes of the income tax deduction for traveling expenses, but that amounts expended by such member for living expenses shall not be deductible in excess of $3,000.

The $3,000 ceiling was agreed upon by the Conference Committee; the House had passed an amendment imposing no ceiling on the amount deductible but the Senate had stricken the amendment entirely.

According to Congressman John McCormack of Massachusetts, the then majority floor leader and the proponent of this bill in the House, its purpose was to place Congressmen on a par with other taxpayers.

The Congressman said concerning "home":

> "Tax administrators and judges have had difficulty in arriving at a definition of the term 'home'

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* A letter dated March 20, 1953, from the Internal Revenue Service to Congressman Daniel Reed, Chairman of the House Ways and Means Committee, held that the $3,000 maximum only applies to Washington expenses and not to additional traveling expenses outside of Washington which a member of Congress might incur. The latter is summarized at ¶L-5707 of Vol. 3 of the Research Institute of America Tax Coordinator.

and in applying the statutory language to specific cases.'"*

Later in his explanation of the problem involved, Congressman McCormack referred to the *Lindsay* case, *supra*, which held that the principal place of business was "home", and said:

> "On this reasoning—which is judicial legislation if I have ever seen it—the expenses of a Member of Congress while attending a session of Congress were held not to be deductible * * *."*

The thrust of Mr. McCormack's statements was that a Congressman should receive the same tax treatment as any other person; and if he must maintain two homes because of his business, then he should be entitled to deduct expenses as would any other taxpayer.**

To Senator Walter F. George,*** however, the problem of whether a Congressman is in a trade or business in Washington was still a subject of dispute in 1952. When the bill reached the Senate, Senator George stated his position in very certain terms. As to the proposed amendment, Senator George said that it simply classified Congressmen as businessmen.****

Senator George commented with respect to an Internal Revenue Service ruling that a member of Congress has two homes, one where he lives and one in Washington:

> "That is one of the unaccountable rulings the Treasury sometimes makes. Of course, it is nonsense, * * * as are so many of their decisions. I do not defend the Treasury at all, but they could have

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* 98 Cong. Rec. 5280 (1952).

** 98 Cong. Rec. 5281 (1952). In 1953, in an unsuccessful attempt to remove the $3,000 ceiling, Mr. McCormack presented the same purpose and reason for the amendment. 99 Cong. Rec. 7003 (1953).

*** The then Chairman of the Senate Finance Committee. The bill had been reported out to the Senate by the Senate Appropriations Committee.

**** 98 Cong. Rec. 8277 (1952).

placed their decision upon a sound basis—namely that a public official is not conducting a private business for gain.'"*

These are not the comments of someone accepting the Service's position on "home."

Relatively few other Senators commented on the floor of the Senate, other than by their vote on the amendment, with respect to the Service's interpretation of "home". Prominent among the defenders of the Service was Senator Harry Byrd of Virginia.**

It is submitted that the legislative history of the 1952 amendment does not show that Congress accepted the Commissioner's then interpretation of "home."

(f) The Decisions of the Lower Courts—the Bercaw Case.

In general, the discussion in Petitioner's Brief of the decisions of the lower courts is substantially correct, except as indicated herein.

Its discussion of the *Bercaw**** case, the only case relied on in the Petition for Certiorari as being in conflict with the decision below, is a striking exception; that case is readily distinguishable from the case at bar.

Bercaw was called up as a reserve Army officer on August 20, 1941 and thereafter was stationed at Fort Meade, Maryland, at least as long as December 31, 1941. His family (his wife and child) lived during that period at their farm near Wilmington, Virginia, some 160 miles from Fort Meade. The Government furnished no quarters at Fort Meade to house his wife and child. It was held that Bercaw could not deduct the cost of his meals at the Army mess at Fort Meade.

It is submitted that the *Bercaw* case did not involve an impossible-to-move situation at all.

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* 98 Cong. Rec. 8277 (1952).

** 98 Cong. Rec. 8281-8282 (1952).

*** 165 F. 2d 521 (4th Cir. 1948).

II

The fact that respondent was an officer in the armed services should not change the result.

The instant facts are basically similar to facts that might arise in the case of civilians. Thus Captain Stidger was transferred to a foreign area for a fixed period, was told that he could not take his family with him, that he would be moving around a good deal within a particular area of the world, the Far East, and that he must be prepared to make such a move on little or no notice.

The only differences of conceivable relevance between the instant facts and those likely to arise in the case of a civilian were (1) that Captain Stidger continued to receive from his employer certain allowances for meals and lodging, in the same amounts which he had received back home, (2) those allowances continued to be exempt from income tax and (3) his only additional expenses while abroad, over those which he would have incurred while in the United States, were the cost of his meals, which he obtained at a relatively low cost, lower than the cost of the average civilian.

Petitioner's Brief relies (at p. 21 *et seq.*) on the system of allowances and benefits for a serviceman, in contending that the deduction claimed should be disallowed because Captain Stidger was in the Armed Services.

Respondent received the same pay and basic allowances while in the Far East as he did while residing with his family in the United States. No increase therein was received by him during the taxable year 1958 to help defray the increased expenses presumably incurred by him while required to live away from his family.

These basic allowances (for subsistence and quarters) which respondent continued to receive are granted by statute* independently of whether the officer is required to travel, or is in travel status and are entirely unrelated to expenses incurred in travel. Revenue Ruling 55-572, 1955-2 Cum. Bull. 45, 46.

While the basic allowance for subsistence may have been fixed by Congress at an amount believed to be roughly equal to the then cost of meals in an officers' mess,** such basic allowance is not considered by the Internal Revenue Service, in the case of an officer who travels, as reimbursement for additional expenses incurred by reason of travel. Revenue Ruling 55-572, 1955-2 Cum. Bull. 45, 46.

The Internal Revenue Service rulings with respect to the income tax consequences of the basic allowances to a serviceman for meals and subsistence (which allowances have been long treated as tax-free***) have not been consistent in their approach.

Initially the Internal Revenue Service ruled under the Revenue Act of 1921, that a naval officer who was stationed in one locality "for an indefinite period of time" may not deduct the cost of his meals and lodging because he is not "engaged in traveling in pursuit of a trade or business." I. T. 1404, I-2 Cum. Bull. 145 (1922).

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* 37 U. S. C. 402, 403.

** The last increase in such basic allowance was in 1952. Act of May 19, 1952, c. 310, 66 Stat. 80. The Hook Commission stated (see Petitioner's Brief, pages 23, 24) that the appropriate guide for determining the amount of such allowance is the amount equivalent to defray the cost to the individual of the officers' mess (page 11 of Hook Commission Report; Government's Brief, page 24). While the Hook Commission recommended an increase in the subsistence allowance, Congress has not yet acted on the matter.

*** Regs. §1.61-2(b); T. D. 3274, IV-2 Cum. Bull. 136 (1925); I. T. 3597, 1943 Cum. Bull. 69; I. T. 3456, 1941-1 Cum. Bull. 193; I. T. 3420, 1940-2 Cum. Bull. 40; I. T. 2219, IV-2 Cum. Bull. 41 (1925); *Jones* v. *U. S.*, 60 Ct. Cl. 552.

At about the same time the Service ruled under the 1921 Act that a naval officer "on permanent duty afloat" may deduct amounts expended by him for subsistence while aboard ship, "notwithstanding the duration of such service" if, and only if, he maintains a home elsewhere. I. T. 1497, I-2 Cum. Bull. 89 (1922).

On reconsideration, that ruling (I. T. 1497) was "modified" nineteen years later to hold that a naval officer "on permanent duty afloat" (not a travel status) and who maintains a home elsewhere may deduct only that portion of the amount expended by him for meals on board ship as exceeds his money allowance for subsistence. I. T. 3474, 1941-1 Cum. Bull. 207 (1941). If he does not maintain a home elsewhere, he is entitled to no deduction under either the 1922 or 1941 rulings.

In 1955 the Internal Revenue Service, in two rulings promulgated simultaneously, modified both the 1922 and 1941 rulings. It first announced a rule that members of the Armed Forces of the United States on permanent duty assignments at official stations overseas are not traveling "away from home" and may not deduct their expenses for meals and lodgings at such locations, even though they are required to maintain homes in the United States for their families who are not allowed to accompany them. Rev. Rul. 55-571, 1955-2 Cum. Bull. 44.

This rule was to apply to a naval officer while at the home port of his ship, inasmuch as he was then at his principal or regular post of duty. That ruling went on to say that a naval officer could deduct the cost of his meals while on board ship, inasmuch as he would then be considered to be in travel status for tax purposes.

Revenue Ruling 55-571 closed with the statement that the aforementioned 1922 and 1941 rulings "are modified

to the extent that they are inconsistent with the foregoing conclusions concerning the meaning of the term 'home.'"

The companion 1955 ruling decreed that *per diem* allowances received by officers of the uniformed services of the United States traveling on official business away from their designated post of duty were includible in their gross income; that expenses for meals, etc., incurred by them while in such travel status, assuming that they were otherwise deductible, were deductible in full without the necessity of offsetting against such expenses the amount of basic subsistence allowances received. Revenue Ruling 55-572, 1955-2 Cum. Bull. 45. That ruling went on to say that the 1941 ruling referred to above (I. T. 3474) "is modified to the extent it requires a naval officer on permanent duty afloat to offset his (basic) subsistence allowance against any expenses incurred for subsistence while aboard ship before taking deductions therefore."

Thus at the end of 1955 the position of the Service seemed to be that a naval officer could deduct the entire cost of his meals on board ship or away from his home port or base, but no part of the cost of his meals (a) at his home port or base, or (b) when stationed in one locality (in this country or overseas) for an indefinite period.

That this is the present position of the Service is made clear in the excerpts, reproduced in Appendix B hereto, from the 1966 Edition (for 1965 tax returns) of "Federal Income Tax Information for Service Personnel," a pamphlet distributed by the Department of the Navy and approved by the Internal Revenue Service.

In 1963 the Internal Revenue Service issued Revenue Ruling 63-64, 1963-1 Cum. Bull. 30. As indicated in the Brief for Petitioner (at pp. 26 and 27 thereof), the ruling dealt with reservists called to active duty by reason of

the Berlin crisis and concluded that such a reservist was performing temporary duty with the Armed Forces.*

A person falling into this category might be entitled to deduct part of the cost of his meals while on active duty, so the ruling held, provided that (1) he had a principal or regular place of business or employment to which he would return after his period of service and (2) he was stationed away from the general area where his civilian place of employment or other business was located. The ruling went on to say, however, that only the excess of his expenses for meals over his basic subsistence allowance could be deducted,** asserting that the remainder of the expenses were allocable to the receipt of exempt income (the basic subsistence allowance), with the result that a deduction therefor was prohibited by Section 265 of the Internal Revenue Code.

Revenue Ruling 63-64 distinguished Revenue Ruling 55-572 as having dealt with expenses incurred while away from the permanent military post of duty, whereas Revenue Ruling 63-64 dealt with expenses incurred while at the principal military post of duty.

The case at bar is, of course, distinguishable from the facts of Revenue Ruling 63-64, in that Captain Stidger would have continued to receive a tax-free basic allowance for

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* The ruling pointed out (1) that Public Law 87-117 provided that the President of the United States might call certain members of the Ready Reserve to active duty for not more than 12 consecutive months and (2) that in fact virtually all of the reservists who were summoned to active duty pursuant to Public Law 87-117 were actually released in less than a year. The ruling concluded that such reservists did not, at the time they were ordered to active duty, expect to remain in active duty status for a full year.

** Revenue Ruling 63-64 is still being followed by the Service with respect to other reservists temporarily called to active duty. See Item 26(b)(4) of the pamphlet distributed by the Department of the Navy and reproduced in Appendix B hereto.

subsistence in any event, whether stationed in the United States or abroad. The reservist considered in Revenue Ruling 63-64, on the other hand, had not been receiving any such allowance prior to his call to active duty. For that reason it would be much more difficult to maintain that expenses incurred for meals were allocable to the receipt of exempt income in the case of Captain Stidger than in the case of the reservists considered in Revenue Ruling 63-64.

For that reason, and for the further reason that the statute (Section 162) allows the deduction of the *entire* amount expended for meals, it is submitted that the Court below correctly held that the entire amount expended by Captain Stidger for meals in the Far East was deductible.

Assuming that Captain Stidger could have eaten at home with his family at a lower cost than the cost of his meals in the Far East, as the Court below believed (R. 70), he was worse off economically while in the Far East in 1958 than he had been in California in 1957; this is true whether or not he is subject to income tax on his basic allowances.

The allowance of the income tax deduction here claimed would alleviate that situation; that should have a salutary effect upon the morale of servicemen similarly situated.

III

In the alternative, even if the Service's general rule as to "home" is to stand, an exception thereto should cover this case.

In the alternative, even if the Service's general rule as to the meaning of "home" is to govern, it is submitted that the deduction here claimed should be allowed by this Court, either by carving out another exception to the Service's general rule or by extending its "temporary" exception,

its "construction worker" exception or its "traveling salesman" exception to cover Captain Stidger's factual situation and other factual situations where (1) the taxpayer has a family living elsewhere (than where he works) and (2) at the time the taxpayer's employment at a new post of duty is begun, it is unreasonable (on the basis of an objective, not a subjective, standard) to expect him to move his family there.

As pointed out above, even the Tax Court has concluded that the Service's "overnight" rule in this field makes no sense. But the "overnight" rule is not the only one of the Service's rules in this field which makes no sense.

The Service's rules with respect to servicemen, summarized in Appendix B hereto, at the very least result in inequities. For example, a naval officer is permitted to deduct the entire cost of his meals on board ship when it is away from home port (whether he is single or has a family and whether or not he maintains a place of abode elsewhere). Thus the supposed reason for the deduction, the duplication in expense, is being ignored.

On the other hand, a serviceman is permitted to deduct no part of the cost of his meals (a) at his home port or base or (b) when stationed at one locality (in this country or overseas) for an indefinite period.

To be contrasted is the treatment of the traveling salesman who has no fixed place of business. He is apparently treated as being away from "home" only if he has a place of abode to which he can return at any time. Not only is this a recognition by the Service that "home" sometimes means a place of abode but it is also inconsistent with permitting a naval officer to deduct the cost of his meals on board ship whether or not he has a place of abode to which he can return at any time.

Captain Stidger's expenses for meals in the Far East, at least to the extent that they represented increased expenses which he would not have had when living with his family, constituted ordinary and necessary expenses which should be deductible. They should be deductible, moreover, regardless of the period of his stay in the Far East. So long as it was impossible for him to take his family along, at the very least, these additional expenses for meals were ordinary and necessary expenses, regardless of the duration of his stay.

Conclusion.

The judgment of the Court below should be affirmed.

Respectfully submitted,

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Amicus Curiae In Support of
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December, 1966

APPENDIX A

The Treasury Department's Technical Memorandum, submitted in connection with the Hearings before the Committee on Ways and Means, House of Representatives, February 6, 1963, stated (at pp. 98-99 of Part I of the Hearings):

"B. TRAVEL EXPENSES

1. General Statement of Recommendation

Under section 162(a)(2) of the Internal Revenue Code, a taxpayer is allowed to deduct traveling expenses while 'away from home' in the pursuit of a trade or business. Since the code at present does not define precisely what is meant by 'away from home,' it has been necessary for the Internal Revenue Service to promulgate rather extensive administrative interpretations. While the Service's interpretations have generally been sustained in litigation, some courts have adopted contrary rules, so that there is now a lack of certainty and of uniformity regarding some aspects of the travel expense area. It is recommended that additional statutory rules be provided to clarify existing law.

2. Redefinition of 'Home'

One of the problems under existing law is the definition of a taxpayer's 'home.' The Internal Revenue Service has defined 'home' as a taxpayer's principal place of business. Although this definition is proper as a matter of statutory interpretation, it is at variance with the commonly accepted meaning of the term 'home.'

The word 'home' would be replaced by the term 'duty area.' The taxpayer's duty area would be defined as a circular area of 20-mile radius with the taxpayer's principal business post as its center. A taxpayer's principal business post would be the place at which he reasonably

anticipates that, during the future course of his present employment, he will principally work or report for work (i.e., the place where he reasonably believes he will work or report for work more than any other place and at least one-third of his working days.) If a taxpayer did not have a principal business post within this definition, then his duty area would be centered around his principal residence. Any taxpayer who did not have a principal business post or a principal residence would be classified as an itinerant.

3. Deductibility of Food and Lodging Expenses

The Service has taken the position under existing law that a taxpayer must be 'away' from home at least overnight in order to be entitled to deduct food and lodging expenses. The proposal would refine and adopt the Service's position, incorporating therein the new definition of a taxpayer's duty area. Food and lodging expenses would be deductible by taxpayers who were temporarily away from their duty areas for periods of at least 16 hours, or a shorter time if they could prove that substantial rest was required on such trip. Itinerants would not be entitled to any food or lodging expense deductions, since they would not have a duty area.

This proposal would not apply to items such as business meals, which would be deductible otherwise, for example, as entertainment expenses.

4. Deductibility of Travel Expenses Other Than Food and Lodging

Aside from food and lodging, travel expenses incurred in pursuit of the taxpayer's trade or business would be fully deductible except for commuting expenses. Thus transportation costs incurred in pursuit of trade or business within or without a taxpayer's duty area once he has reported for work would continue to be deductible. Those transportation expenses incurred in traveling between a taxpayer's residence and any place in his duty area, however, would be commuting expenses and hence nondeduc-

tible. In the case of a taxpayer whose duty area was determined with reference to his principal business post, any travel between his residence and principal business post would constitute commuting expenses no matter how great the distance. In the case of a taxpayer whose duty area was determined with reference to his principal residence, any travel between the residence and any point within a 20-mile radius would be considered commuting. In the case of an itinerant, there would be no transportation costs disallowable on the grounds they were commuting expenses.

5. Definition of Temporary Absences

In case of an assignment to a new place of work, a taxpayer would be entitled to deduct travel expenses only if his absence from his duty area was temporary in nature. A taxpayer would be considered temporarily away from his duty area unless he: (1) moved his principal residence to the new location at which he was working; (2) could reasonably foresee that he would remain at his new place of work for at least 1 year; or (3) did, in fact, remain at the new place of work for 1 year.

6. Manner of Computing Deduction

As under present law, all travel expenses which met the tests for deductibility would be deductible in computing adjusted gross income (i.e., allowable whether or not the standard deduction were elected). Substantiation of deductions would be required in the same general manner as in the case of entertainment expenses. Reimbursed travel expenses would not be subject to withholding.

7. Effective Date

This proposal would be effective for taxable years beginning after December 31, 1963."

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APPENDIX B

The 1966 edition (for 1965 returns) of "Federal Income Tax Information for Service Personnel", a pamphlet prepared and distributed by the Department of the Navy and reviewed "by the Internal Revenue Service which has approved the text of this pamphlet as an authoritative source document," states:

"26. *Deductions from gross income.*—The following items are deductible from gross income in arriving at adjusted gross income:

(a) Travel expenses incurred while a ship or squadron is away from home port or base.—

(1) *Mess bills afloat.*—The amount paid by a member of the Navy on duty afloat may be deducted for the period that his ship is away from its home port, providing the voyage is of substantially longer duration than an ordinary day's work and during which his duties require him to obtain necessary sleep while away from such home port. The principle of this ruling applies equally to air squadron personnel when away from the squadron's home base and to Army personnel when on field duty or maneuvers. The deduction need not be offset by basic subsistence allowances. The mess bills afloat deduction does not apply to mess bills paid at a member's permanent station ashore.

(b) Other travel expense.—

* * * * * *

(2) On temporary or temporary additional duty, expenses, such as those incurred for meals, lodging, taxicabs, laundry and cleaning, in excess of reimbursements are deductible. * * *

(3) Travel expense, including meals and lodging, of Reserve personnel who, under competent orders,

with or without compensation, are required to remain away from their principal place of business overnight in the performance of authorized drills and training duty is deductible.

(4) A reservist temporarily called to active duty may deduct meals and lodging while on active duty if he (a) retained his regular job, (b) returned to it after release, and (c) was stationed away from the general area of that job or business. Such expenses are deductible only if the reservist pays for his meals and lodging at his official military post and only to the extent they exceed BAQ* and BAS*.

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40. *Miscellaneous items — not deductible.* — The following items are not deductible from adjusted gross income:

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(b) Living expenses of personnel stationed in one locality or overseas for an indefinite period."

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* *Note:* The reference undoubtedly is to the basic allowance for quarters and to the basic allowance for subsistence.

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